SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 48.

LOUIS H. PINK, Superintendent of Insurance of the State of New York,

Petitioner,

v.

A. A. A. HIGHWAY EXPRESS, INC., H. A. ADAMS, Trading as ADAMS TRANSFER CO., H. L. BASS, as BASS BUS LINE, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Georgia.

REPLY BRIEF OF PETITIONER.

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The brief of respondents contains many misstatements of fact. Of the authorities cited, some have been specifically overruled by name, while others fail to support the legal propositions for which they are cited. Leave to file this reply brief is requested.

SUMMARY OF QUESTIONS INVOLVED IN THE RECORD.

I.

ALL RESPONDENTS ARE INSURERS.

Respondents have not furnished a summary of the proceedings below and we must assume that they accept the summary set forth by petitioner. It is evident that re-

spondents have entirely overlooked or ignored the real basis of the controversy pending here (our brief, p. 3). The relationship between a policyholder and the association is two-fold; he is both insured and insurer. The contract of insurance indemnifies him against loss. If it was countersigned and delivered in Georgia, an action to recover for losses sustained would be determined by Georgia law, but there is another and second contract. **A policyholder by the acceptance of a policy becomes a member and an insurer.*** **This contract of insurance protects all other policyholders, members of the public and the policyholder himself.**[1]

This **contract of mutual insurance** covers both profits and losses **arising out of the relationship as insurers.** The policy contains specific provisions for these profits [Photostat of Policy, R. 48 (a), paragraph 14]. The statutes of New York and the by-laws contain provisions for assessments covering losses. A member of a mutual company is a partner, with his liability limited by statute.[2]

The case brought by petitioner in the trial court is based entirely on the second relationship. An examination of

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*A clear statement of this rule appears in **Hill v. Baker** (Mass.), 91 N. E. 380, at 381:

> "Each member is at the same time insurer and insured. In one aspect he is a mere holder of a policy containing a contract of indemnity against loss by fire, with a specific and limited fund out of which that indemnity is to be made good. * * * In another aspect he is a member of the corporation, made so by the very nature of the contract, and so declared by law. * * * In this relation he is an insurer, and is affected by another and very different class of obligations."

1 Indeed, the respondents represented by counsel who argue this case have filed large claims in the New York proceedings. They are Kaler Produce Company, Cox Brothers Undertakers, Atlanta Macon Motor Express, Inc., and Continental Carriers, Inc.

2 "* * * That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, * * *."
Bernheimer v. Converse, 206 U. S. 516, at 530.

This rule prevails in New York, **Beha v. Weinstock**, 247 N. Y. 221, and it is the law of Georgia, Code of 1933, Sec. 56-1401 (Our Brief, p. 29).

the original petition and the amendment (R. 7 to 19) discloses that the policy was not sued on. The action is clearly based upon the liability arising from the statutes of New York and the judgments entered in the liquidation proceedings. Subsequently, and in answer to special demurrers which called for a copy of the policy, the policy was exhibited, but it was not sued on. It is merely evidence of the relationship which could have been proven otherwise.

"THE RIGHTS OF MEMBERSHIP ARE GOVERNED BY THE LAWS OF THE STATE OF INCORPORATION."

Sovereign Camp W. O. W. v. Bolin, 305 U. S. 66, 75 (our brief, p. 20).

II.

THE SOLE QUESTION INVOLVED.

(Respondents' Brief, Sec. 3, p. 6.)

Respondents, in the third section of their brief, set forth two questions, the answer to which they assert is of major importance. We agree with them. The determination of the questions, or the single question differently stated, lies at the foundation of the case. But respondents have "loaded" the questions by extraneous and untrue matter. We first adjust the questions to the record and then proceed to consider them.

Respondents say:

1. The sole and controlling question in the case is this: DID DEFENDANT POLICYHOLDERS, BY THE MERE ACCEPTANCE OF THE INSURANCE POLICY ISSUED TO THEM [exhibited in the Record, R. 41-43. Photo copy R. 48 (a)] KNOWINGLY AND VOLUNTARILY BECOME MEMBERS OF AUTO MUTUAL INDEMNITY COM-

PANY OF NEW YORK, SO AS TO BECOME LIABLE FOR THE ASSESSMENTS PROVIDED FOR BY THE STATUTES OF NEW YORK AND THE CHARTER AND BY-LAWS OF SAID COMPANY?

2. To put the question in another way: DOES THE STATUTE LAW OF NEW YORK ENTER INTO THE CONTRACT OF THE RESPONDENTS SO AS TO CREATE THE MEMBERSHIP RELATION WHICH UNDER THE NEW YORK LAW CARRIES WITH IT THE LIABILITY TO ASSESSMENT, OR MUST THAT RELATION BE FIRST CREATED BY THE CONVENTIONAL ACT OF THE PARTIES, WHEREUPON THE MEMBERS BECOME BOUND BY THE LAWS OF NEW YORK DEFINING THEIR LIABILITY?

Both questions must be answered in the affirmative. In our brief (pp. 18-22) we said, with ample citation of authority, **unless the laws of the incorporating state provide the contrary it is one of the attributes of mutual insurance that the policyholders shall be the members.**

Short quotations from the cited cases seem appropriate. In **Duffy v. Mutual Benefit Life Ins. Co.**, 272 U. S. 613 (our brief, p. 18), this Court, at page 616, said:

> "Respondent is a mutual company having no capital stock; and **its policyholders constitute its members.**" (Emphasis ours.)

And further, at page 619:

> "* * * **each member bears a relation to the mutual company analogous to that which a stockholder bears to the joint stock company.**" (Emphasis ours.)

That there is a radical difference between mutual and stock companies is a matter of common knowledge. Speaking of it in the **Hartford case**, 301 U. S. 459 (our brief, p. 18), this Court, at **page 463**, said:

"It is idle to elaborate the differences between mutual and stock companies. These are manifest and admitted."

And at page 466:

"The principle of assessment upon which mutual companies proceed is practical only for carrying risks closely uniform in kind and degree."

More than fifty years ago the Supreme Court of Michigan clearly stated the controlling principle. In **Russell, Receiver, v. Berry**, 16 N. W. Reporter 651, at 652-653, it held:

"The law is now dealing with the company when it has become insolvent, and is being wound up in chancery. There is no capital stock. The means to pay losses and expenses, and also for services, must be obtained, if at all, by the levy of contributions in accordance with the vital principle of all such organizations. There can be no other resort * * *.

"The obligation of the insured party is fundamental. It does not depend upon the form which may be given to his promissory 'undertaking.' It is a positive result of his connection with the company, and the principle which underlies it somewhat resembles that which underlies the liability to taxation. Responsibility is inseparable from the status of an insured member. The organic act makes it so, and no kind of stipulation between the agents of the company and the person who becomes insured can supersede or impair it. It would be just as practicable for a person entering into marriage to provide by covenant against its necessary and imperative duties and obligations."

That respondents knew that the insuring company was a mutual casualty company, organized and chartered by authority of New York law, cannot be denied. The pleadings allege it [R. 21, paragraph 9, Exhibit H; R. 41-43,

Policy photo, R. 48 (a)]. By demurring generally all respondents admit this allegation.

When the nature of the insuring company is added to the question proposed, the answer is obvious. Respondents were members of the company. This is true whether the rule applicable to New York corporations or Georgia corporations be applied. It is amply confirmed by the decisions of this Court and of state courts cited in our brief (p. 18).*

The second question proposed by respondents is: DOES THE STATUTE LAW OF NEW YORK ENTER INTO THE CONTRACT OF THE RESPONDENTS SO AS TO CREATE THE MEMBERSHIP RELATION WHICH UNDER THE NEW YORK LAW CARRIES WITH IT THE LIABILITY TO ASSESSMENT, OR MUST THAT RELATION BE FIRST CREATED BY THE CONVENTIONAL ACT OF THE PARTIES, WHEREUPON THE MEMBERS BECAME BOUND BY THE LAWS OF NEW YORK DEFINING THEIR LIABILITY?

The answer is obvious and we have answered it in our brief (p. 26). **Consent is not necessary to create liability arising out of the statute. Howarth v. Lombard,** 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; **Bernheimer v. Converse,** 206 U. S. 516, and other decisions of this Court.

The authority cited by respondents (p. 13, their brief) supports our contention, not theirs. The respondents having voluntarily become members of the corporation, "this assent creates the contractual element of the liability, bringing it within the protection of the constitutional pro-

*In addition to the recent cases cited in our brief (p. 18), the principle is recognized by a long and unbroken line of decisions. Among them are **Swing v. Taylor & Crate** (W. Va.), 70 S. E. 373, and **Huber v. Martin,** 115 Am. St. Report 1023, at 1034 (cited in our motion for rehearing, R. 102), holding: "It is thus laid down by text-writers, based on authority: 'Membership dates in each case from the time when the insurance is effected.' * * * Am. & Eng. Ency. of Law, 2d Ed., 264-266."

hibition in regard to impairing the obligation of contracts."†

The failure to mention the liability to assessment in the policy does not relieve respondents from liability. By their demurrers they have admitted the truth of the following allegations of the petition (Amendment of July 25, 1940, R. 22-23):

> "It is the law of New York that every person who accepts a policy of insurance in a mutual insurance company thereby becomes a member thereof. * * *
>
> "It is the law of New York that the aforesaid section 346 compels the company to fix the contingent mutual liability of the members; and that failure to mention the liability to assessment in the policies or by-laws does not release policyholders from liability to assessment, but results in their liability being fixed in accordance with Section 346 of the New York Insurance Law. * * *
>
> "It is the law of New York that the laws of that state govern the rights, liabilities and duties on liquidation of policyholders in mutual insurance companies incorporated and liquidated in that state."

III.

We will now consider the brief of the respondents, following the subject matter used therein.

1. Respondents contend: FULL FAITH AND CREDIT NOT DENIED PETITIONER; THIS COURT SHOULD DECLINE JURISDICTION.

We agree with the respondents that the decree entered by the Master was not a personal judgment against the

†Conflict of Laws and the Enforcement of the Statutory Liability of Stockholders in a Foreign Corporation, 23 Harvard Law Review, pp. 37-48. Other portions of this scholarly article fully support the propositions for which we contend.

nonresident respondents. For this reason the case of **Pennoyer v. Neff**, 95 U. S. 714, is no wise in point.

The judgments upon which we rely are enumerated in our brief (pp. 43-44). Such judgments come within the rule announced in **Bernheimer v. Converse**, supra, and similar cases. In a stockholder's assessment suit, **Gilson v. Appleby**, 81 Atlantic 925, 926, this distinction was clearly stated. A quotation from that decision disposes of the question:

> "The contention is based upon the idea that such a decree, rendered against him under the circumstances indicated, would be in violation of the right guaranteed to him by the fourteenth amendment of the federal Constitution, as construed in Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. But the doctrine of that case does not go to the extent claimed for it. Although it was there held that a personal judgment obtained against a defendant who was not a resident of the jurisdiction in which it was rendered, and who has not been served with process in that jurisdiction, and had not appeared, was void, the court was careful at the end of its opinion, in order 'to prevent any misapplication of the views expressed' in it, to make the following statement: 'We do not doubt that a state, on creating corporations for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, **their obligations enforced**, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law.' That a proceeding like that now before us, when it results in an adjudication against a nonresident stockholder, not served with process, such as is prayed for by the receiver, neither deprives a stockholder of his property without due process of law, nor denies him the equal protection of the law, is settled, as we read its opinion, by the United States

Supreme Court, in the case of Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163."

The identical question was recently passed upon by this Court.

Titus v. Wallick, 306 U. S. 282-292.

At page 287 the Court said:

"The right asserted by petitioner to have the New York judgment enforced in the courts of Ohio (Georgia) is one arising under the Constitution and a statute of the United States. And since the existence of the federal right turns upon the legal effect of the proceedings in New York and the validity of the judgment there, the rulings on those points by the Ohio (Georgia) court are reviewable here. * * * While they involve questions of local law * * * its determination cannot be accepted here as decisive if the constitutional command is to be observed."

The respondents referred to judgments and entirely overlooked the claims based on the **statutes of New York** and the **charter** issued thereunder. A controversy respecting the full faith and credit, to which these are entitled, raises a federal question for determination by this Court.

Hancock National Bank v. Farnum, 176 U. S. 640;
Adam v. Saenger, 303 U. S. 59;
Sovereign Camp W. O. W. v. Bolin, 305 U. S. 66, supra;
Our brief, pages 13, 14.

OTHER CASES CITED BY RESPONDENTS ARE NOT IN POINT.

Wisconsin v. Pelican Insurance Co., 127 U. S. 265, is not in point. It was held that the case was not within the class over which this Court had original or appellate jurisdiction.

Nor is **Bagley v. General Fire Extinguisher Co.**, 212 U.

S. 477, anywise in point. The appellant was not a party to the judgment which it sought to use as a basis for the constitutional protection invoked. The Court also found that it was without jurisdiction because a constitutional question had not been raised in the complaint.

Commercial Publishing Company v. Beckwith, 188 U. S. 567, went off on the same principle. From the meager record before the Court it did not appear that the person asserting the constitutional protection to which the decree was entitled was a party at the time of the entry of the decree, the burden resting upon him to prove this fact and the record leaving the matter in doubt, this Court very properly refused to sustain the claim.

The cases of **Old Wayne Mutual Life Association v. McDonough,** 204 U. S. 8, and **Wetmore v. Karrick,** 205 U. S. 141, are not in point. They merely state a familiar principle of law that a judgment rendered in personam without jurisdiction of the person is void.

Pacific Employer's Inc. Co. v. Industrial Accident Commission of California, 306 U. S. 493, is no wise in point. The case deals with rights arising out of workmen's compensation laws of California, applied to an injury which took place there and for which damages were sought in its courts. There the refusal to give full faith and credit to and thereby substitute for its own statute the laws of another state in conflict with the public policy of California was sustained by this Court. But no such question of public policy is here involved. By direct ruling the Supreme Court of Georgia eliminated this question from the record. It said (R. 94):

> "• • • we are not here concerned with the rule • • • whether the court of the forum will decline to apply the law of the situs when the application of such law would contravene the established public policy of

the forum. Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, * * * 92 A. L. R. 928, and cit."

The court below could not have justified its refusal to enforce the cause of action by any alleged conflict with its public policy because its public policy was entirely consistent with the decisions in New York. In **Alma Gin & Milling Co. v. Peeples**, 145 Ga. 722, it had accorded to Georgia residents the very relief here sued for and under identical circumstances. It justifies its refusal to accord similar relief to petitioner on the ground that petitioner sued on a contract made in Georgia and to be measured by the laws of that state.

As heretofore stated, the basic error upon which rests the decision of the court below, and the argument of the respondents, arises from a mistaken assumption that the relationship between mutual policyholders and the association arises entirely out of the policies issued by the association. The Supreme Court of Georgia clearly evidences this viewpoint when it says (R. 93), "Was there anything in **their contracts with the companies, to wit, the policies themselves**, which constituted them members?" (Emphasis ours.) But the contracts with the company and the policies are not synonymous. The policies are evidence of one relationship—the contracts with the company are twofold. (a) The company insured the policyholders. Any action arising out of this insurance is based on a Georgia contract and determinable by its laws. (b) The policyholders became members of the mutual association. That contract was made and certainly was to be performed exclusively in New York, and the laws of New York and the decisions of its courts are decisive of all rights and liabilities arising thereunder.* Petitioner's action is based

*The rights of membership are governed by the law of the state of incorporation." **Sovereign Camp W. O. W. v. Bolin, supra, 305 U. S. 66. at 75 (2).**

upon the second relationship between the parties.† The court below refused to consider it, thereby depriving petitioner of his rights under the contract and the benefits of the statutes of New York and the judgments in the liquidation proceedings.

Viewed from this standpoint, the courts of the forum may not constitutionally deny recognition of foreign laws. The courts of the domicile are the only courts which can determine the value of the assets, amounts of liabilities, the percentage of assessment and the recognition of the rights of creditors, which include the policyholders. Under such circumstances the laws of the domicile prevail.*

Whether the courts of the forum may constitutionally deny enforcement of foreign laws depends upon the circumstances of each case. This Court so points out in a recent decision.

Griffin v. McCoach, ... U. S. ..., 61 Sup. Ct. 1023.

The case is reported in 134 A. L. R. 1462 with an excellent note at page 1472.

The instant case properly falls within the second class mentioned in this note. Such cases as **John Hancock Life Ins. Co. v. Yates**, 299 U. S. 178, and **Hartford Accident & Indemnity Co. v. Delta & Pine Lane Co.**, 292 U. S. 143, govern this case.

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†"It sometimes happens that a contract may be intended by the parties to be performed, as to different parts thereof, in several places. If the contract relates to several distinct and divisible acts, there is no difficulty in perceiving that as to each of these several acts in performance of the contract the contract may have a separate locus solutionis. In reality, there are several contracts in one."

Minor on Conflict of Laws, Sec. 160, cited in **Mutual Benefit Health & Accident Assoc. v. Baldridge**, 70 Federal (2) 236.

*An excellent illustration of this principle will be found in **Relf v. Rundle**, 103 U. S. 222, cited with approval by the Supreme Court of Georgia in **O'Malley, Supt., v. Wilson**, 182 Ga. 97, 185 S. E. 109, and **Canada Southern Railroad Co. v. Gebhard**, 109 U. S. 527. These cases will be discussed in the concluding portion of this brief.

2. Respondents contend: THE ACTION IS NOT AN ACTION FOR UNPAID PREMIUMS.

A casual examination of the record disproves this contention. It should be remembered that the liquidation statute of New York specifically provides for the determination of other indebtedness, as well as assessments (R. 30, Sec. 423).

In the original petition (R. 8, paragraph 7) appears a definite claim for assessments due from each policy and "pursuant to Section 423 • • • the amount of indebtedness of each member to the Company apart from the indebtedness for assessment."

The itemized statement of the indebtedness (R. 11-14) specifically sets forth the other indebtedness and the premiums, and the Supreme Court of Georgia in its statement of the case (R. 85) finds that the Superintendent computed the amount of the assessment and pursuant to section 423 computed the amount of indebtedness of each member to the company apart from the indebtedness for assessment.

The Supreme Court of Georgia, in an identical case, **Globe & Rutgers Fire Ins. Co. v. Salvation Army**, 177 Ga. 890, at 898, recognized the right of the plaintiff, first asserted on rehearing, to recover premiums though the main relief prayed for had been denied.

3. Respondents' third contention, THE SOLE QUESTION INVOLVED, has been dealt with in the opening part of this brief. Without repeating the questions, we will deal briefly with the authorities cited.

Respondents place a strained construction upon **Supreme Council of Royal Arcanum v. Green**, 237 U. S. 531, when they say that Green was unquestionably a member of his association. But Green accepted his policy and joined the

association in New York, and the question there involved was whether the courts of New York were bound to accord full faith and credit to the laws of Massachusetts, the domicile of the corporation. The case does not turn on the narrow distinction suggested. It holds that, notwithstanding the local incidents which surrounded his entry into the association, the company was a Massachusetts corporation, and the rights of membership were governed by the laws of that state. As we pointed out in our original brief, the principles there announced are not limited to fraternal orders.

Respondents quote from **Sovereign Camp W. O. W. v. Bolin**, 305 U. S. 66, and assert that inasmuch as the Missouri courts were powerless to disregard the fundamental law of the association and turn a membership beneficiary certificate into an old-line policy, New York is likewise unable to turn an old-line policy into a beneficiary certificate or mutual policy. But this argument begs the question. This is not an old-line policy. It is a mutual policy, issued by a corporation incorporated in New York, under whose statutes and the charter of the company submission to assessment was mandatory. The distinction is fully pointed out in the quotations made by us from the **Green case** (our brief, p. 16).

Respondents' citation of **Chandler v. Peketz**, 297 U. S. 609, is garbled. The Court (at p. 611), after asserting the familiar principle that stockholders in foreign states are bound by the decree of assessment in the state of the domicile, points out that such decrees are not in the nature of personal judgments, and that no stockholder is precluded from making defenses personal to himself. In that case, as in this one, no personal defenses were asserted. The action of the state court in dismissing, on general demurrer, a petition seeking to recover the assessment was reversed. This is the relief prayed for here.

Respondents admit that under similar circumstances a stockholder's assessment would be collectible. That liabilities of stockholders and of members of a chartered mutual association are analogous is quite clearly established in this Court. **Duffy v. Mutual Benefit Life Ins. Co.**, supra, 272 U. S. 613 (original brief, p. 18, this brief, p. 4). Respondents, as members, are clearly liable. Borrowing an authority from respondents' brief (Broderick v. Rosner, p. 9), the respondents having accepted policies, should not be permitted "to escape from the provisions of a voluntarily assumed statutory obligation, consistent with morality, to contribute to the payment" of creditors of an insurance company of another state of which they were policyholders.

Finally respondents assert that they have found no decided case where the policyholder is subjected to liability because of the mere acceptance of such a policy. Ample authority for this proposition is found in our brief (p. 29 et seq.).

4. Respondents assert: THESE DEFENDANTS DID NOT UNDER THEIR CONTRACTS BECOME MEMBERS OF THE ALLEGED MUTUAL INSURANCE COMPANY.

The argument under this section illustrates the basic misconception which permeates the entire brief. A mutual insurance contract, from its very nature, is twofold—insured and insurer. The respondents are sued as insurers. The authorities which they cite do not deal with this relationship.

Respondents cite isolated sentences from **Couch on Insurance**, and thereby the true meaning of the text is destroyed. One illustration will suffice. Quoting from **Couch on Insurance**, Section 251 (p. 11, their brief), they con-

clude the paragraph with a period and enclose it in quotation marks. This results in a complete distortion of the text. The complete sentence is divided by a semicolon and is as follows: "* * * and in such a case the plan is not that of mutual insurance; at least, under the Illinois laws." It is, therefore, quite evident that respondents have not placed the true rule before the Court.

In the same paragraph (Sec. 251) the text-writer continues as follows:

> "However, the generally accepted rule seems to be the better one, so that the mere fact that the premiums are paid in cash does not necessarily destroy the feature of mutuality. Of course, where this rule is adopted each member has an interest in the surplus premium fund, if any, remaining after payment of losses and expenses, and this latter feature marks a distinction between mutual companies and stock companies, for the policyholder in a stock company has no such right."

Furthermore, it is evident from the same text that the New York mutual company referred to therein was a life insurance company organized under the New York Statute of 1849, Chapter 309, which contained provisions entirely different from the statutes governing a casualty company. Indeed, life insurance companies, chartered in New York, have for many years been permitted to issue nonassessable policies. This rule did not apply to mutual casualty companies and, as pointed out in our brief (page 25), it required a change in the statute to accomplish this purpose.

The liabilities to which policyholders in a mutual company subject themselves depends entirely upon the statutes of the state of the company's domicile. Mr. Couch has stated the rule correctly (section 253, page 603), when he said:

> "And the above rules are especially subject to those

> exceptions which arise in favor of such companies by reason of express statutory exemptions from the operation of the general insurance statutes which some of the states have enacted, or other statutory provisions defining **or fixing their status.** * * *."

Craig v. Western Life Ins. Co., 116 S. W. 1113 (Respondents' Brief, p. 13), is not in point. It merely holds (compare second headnote, p. 1114) that a company, chartered in Illinois, writing assessment policies and assuming liability on old-line policies, may not impose the latter liability upon funds arising from assessments.

With respondents' citation from **23 Harvard Law Review**, at page 38, we are in entire accord. Acceptance of the policy evidences assent, and the rule quoted completely destroys their defense.

> "This assent creates the contractual element of the liability, bringing it within the protection of the constitutional prohibition in regard to impairing the obligation of contracts."
>
> (Respondents' Brief, p. 13; this Brief, pp. 6-7.)

Respondents cite Section 346 of the New York Insurance Laws (Their Brief, p. 14), requiring the corporation to make provisions for the contingent mutual liability of the members in the by-laws and the policies. The record discloses that such provision was made in the by-laws (R. 23). The failure to make the same provision in the policies does not relieve the policyholders of this liability.

> **In re Auto Mutual Indemnity Company**, 14 N. Y. S. (2) 601;
> (Appendix to brief accompanying petition for certiorari, pp. 40-41);
> **Beha v. Gale**, 223 N. Y. Supp. 253.

Members of mutual associations are universally bound by the by-laws. Our brief demonstrates that this is the

rule in Georgia and in New York.* It is recognized by this Court in a case which we cited in our original brief (p. 31), **Mutual Assurance Society v. Korn and Wisemiller,** 7 Cranch. 396, that policyholders of mutual associations are bound by its by-laws. This Court, at page 399, referring to its previous decision in **Korn and Wisemiller v. Mutual Assurance Society,** 6 Cranch. 192, says:

> "It is there laid down, and on reflection we are confirmed in the opinion, that in the capacity of an individual of the body corporate the defendants are bound by the by-laws of the society as far as is consistent with the nature of its institution."

And in the case of **Korn and Wisemiller v. Mutual Assurance Society,** 6 Cranch. 192, at 201, this Court said:

> "We are of the opinion that while Korn and Wisemiller continued members of the society, they remain subject to the general liability which that state imposes; * * *."

5. Respondents assert: THE NATURE OF THE POLICY ISSUED DID NOT CONSTITUTE THE POLICYHOLDERS AS MEMBERS.

This argument overlooks the fact that it is not the policy from which their membership arose. It is their status which determined their membership—the policy is only evidence of it.

6. EFFECT OF THE WORD "MUTUAL" IN THE POLICY.

What has been said above disposes of all contentions here made.

7. Respondents assert: THE POLICY HAVING BEEN ISSUED IN DIRECT VIOLATION OF LAWS OF NEW

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*The rules have been cited (p. 2, supra.)

YORK, THE POLICYHOLDER CANNOT BE HELD LIABLE FOR ASSESSMENT.

We deny this argument at the threshold. The policy was not issued in direct violation of the laws of New York. It did not violate the laws directly or by implication, and the provisions in the laws of New York requiring these provisions to be placed in the policy do not specify that they be placed in the face of the policy. But further and beyond this, we have heretofore demonstrated that the failure to include this provision in the policy does not relieve respondents from liability to assessment. (This brief, supra, pp. 6-7; original brief, pp. 26-29.)

Irwin v. Currie, 64 N. E. 161, cited under this section, not only fails to support the rule contended for, but the ruling is to the contrary. The Court refused to hold invalid a contract for the division of fees between a layman and a lawyer because the penalty of the statute was applicable to the lawyer. The Court also refused, by implication, to extend it to the layman. Here there is no statute making the act unlawful.

Respondents raised no such points in their defenses, nor did the courts below consider them. There is a very cogent reason why respondents have not heretofore contended that the policy was issued in violation of law. They have relied on the policy in bringing an action in the courts of Georgia to subject the statutory deposit made by the company, as a condition to its qualification in the state, and the respondents in whose behalf the brief is filed in this court have filed large claims in the liquidation proceedings in New York. Seeking benefits under the policies, they cannot destroy them on the theory that they were issued in violation of law.

Greenlaw v. Aroostook County Patrons Mutual Fire Ins.

Co., 105 Atlantic Reporter 116 (Respondents' Brief, p. 18), is nowise in point. It involves the liability of the insurance company as an insurer.

New York Life Ins. Co. v. Street, 265 S. W. 397, deals with the same relationship. There a life insurance company, authorized by its charter to issue a policy, was, after many years acquiescence, estopped from denying the force of the policy.

8. Respondents contend: THE LIQUIDATOR HAS NO GREATER RIGHT TO RECOVER AGAINST POLICYHOLDERS THAN THE COMPANY HAD PRIOR TO LIQUIDATION.

Neither the general rules of law nor the authorities cited sustain this proposition. **Beha v. Breger**, 223 N. Y. S. 726, does not truly state the law of New York. The identical question was decided by another trial judge in **Beha v. Weinstock**, 221 N. Y. Supp. 500, and was reversed by the Court of Appeals of New York in **Beha v. Weinstock**, 246 N. Y. 221 (Our Brief, p. 29). The liquidator, suing in behalf of creditors, may recover though the company might be estopped.

The terms of a contract which contravene a statute do not make the contract void. The contract remains, but the invalid provisions are nugatory after insolvency sets in.

Handley v. Stutz, 139 U. S. 417, 35 L. ed. 234.

The insurance laws of New York are exclusively controlling on this subject and all provisions of general or statutory law in conflict therewith are excluded.

In re National Surety Company, 27 N. E. (2) 505.

"Every restriction upon the defendant's contractual power, imposed by these laws (New York Insurance

Laws), followed the defendant into every jurisdiction where it undertook to contract."

Sliosberg v. New York Life Ins. Co., 155 N. E. 749, at 753.

Had the officers of the company attempted to except particular policies from the burden of assessment, the action would have been ultra vires and ineffective.

Cooley's Briefs, 2d Edition Supp., p. 1587;
Beha v. Gale, 223 N. Y. S. 253;
Lahey v. Lahey, 66 N. E. 660 (Court of Appeals of New York).

"Doubts which otherwise might have existed in respect to the character and effect of the transaction are no longer open."

Coombes v. Getz, 285 U. S. 434, 448.

9. Respondents contend: RESPONDENTS ARE BOUND ONLY BY POLICY PROVISIONS IN FACE OF POLICY.

Respondents here concede that the statute laws of Georgia are not applicable to casualty insurance. Assuming as true that the laws of Georgia require that the policy of insurance be entirely in writing, this does not apply to the provisions for assessment when the action is instituted by creditors. The Supreme Court of Georgia has so decided in direct language. **Alma Gin & Milling Company v. Peeples**, supra, 145 Ga. 722 (Our Brief, p. 47).

The Georgia cases cited by respondents deal entirely with liability arising out of losses covered by the policies.

Dwindell v. Kramer, 92 N. W. 227, is an exceptional case, based upon the statutes of that state. The excerpt which is quoted by respondents is a portion of the statute and in the absence of this condition there was no liability. The ruling sustains the contentions here made. In order for this principle to become applicable, the statute must itself

provide that these provisions shall be plainly and legibly stated in the face of the policy. The New York statute containing no such provision, the entire argument will be disregarded.

Baker v. Sovereign Camp W. O. W., 116 S. W. 513 (the citation should be 116 S. W. [2] 513), is not a true statement of the Missouri law. We must assume that counsel cited this case from a digest. Had they examined the case in the Southwestern Reporter they would have found evidence of its transfer to the Supreme Court of that state. The highest court of that state overruled the opinion of the Kansas City Court of Appeals (125 S. W. [2] 849) upon the authority of the decision made by this Court in **Sovereign Camp W. O. W. v. Bolin**, supra.

While the case is cited under the next heading, we will here consider **Wilhelm v. Security Benefit Association**, 104 S. W. (2) 1042, because it deserves the criticism made of the Baker case. The **Wilhelm case** has been overruled by name. The original opinion was quashed by the Supreme Court in 114 S. W. (2) 965, and when the case was next considered the principles stated in the former opinion were withdrawn (121 S. W. [2] 295). Indeed, that decision is in line with the general ruling that "the contract is not to be determined from the certificate only."

10. Finally respondents contend: THE RULINGS OF THE SUPREME COURT OF GEORGIA CONSTRUING A CONTRACT MADE IN THE STATE OF GEORGIA ARE BINDING AND FINAL.

The **Wilhelm case** has been discussed above. As pointed out, the rulings contended for were repudiated in 121 S. W. (2) 295.

The citation of the Baker case and the Wilhelm case clearly discloses that respondents persist in their original

errors, and that the position taken by them can be supported only by **overruled** cases. By the same type of citations the Supreme Court of Georgia was led into error. (See our Motion for Rehearing, R. 96-106.) There the respondents relied on **Lee v. Missouri State Life Ins. Co.**, 238 S. W. 858, and it was accepted by the Supreme Court of Georgia as a relevant authority (R. 95). But the **Lee case** had been reversed by name (261 S. W., p. 83), and evidence of its reversal appeared in the very report from which the citation was made (R. 105).

Respondents also relied upon, and the Supreme Court of Georgia accepted as an authority, **McClement v. Supreme Court I. O. F.**, 152 N. Y. S. 136 (R. 93), notwithstanding the fact that the rule upon which the McClement case was based had been specifically overruled by the Court of Appeals of New York upon the authority of **Royal Arcanum v. Green**, supra (McClement v. Supreme Court I. O. F., 119 N. E. 99).

Pink, Supt., v. Georgia Stages, Inc., 35 Fed. Supp. 437, 444, while relied on by the Supreme Court of Georgia as an authority, does not support the claim. The District Judge denied recovery because of his erroneous construction of the New York statutes. He held (p. 444, Conclusion of Law No. 9) that the laws of New York did not prevent this company from issuing nonassessable policies. As pointed out in our motion for rehearing (R. 105), the case of **Factory Mutual Liability Ins. Co. v. Behan**, 253 N. Y. S. 562, was not brought to his attention. Clearly his ruling on this phase of the case was error.

CONCLUSION.

In the brief which accompanied the petition for certiorari and the brief on the merits filed later, the errors committed in the court below are set forth.

Respondents have not challenged our contentions; their

principal defense boils down to a single ground: that the record does not disclose their promise to pay.

But the obligations of a statute are sufficient. Even a foreign statute produces an implied promise. In **Nashua Savings Bank v. Anglo-American Co.**, 189 U. S. 221, at 230, this Court ruled enforcible a charter obligation arising out of the laws of Great Britain. In **Canada So. R. Co. v. Gebhard**, 109 U. S. 527, obligations arising from the laws of Canada were enforced against bondholders resident in New York, though the bonds were payable in that state.

The statutes of New York impose contingent liability to assessment against all policyholders of mutual companies, including those resident in Georgia.

Auto Mutual Indemnity Company carried into Georgia the law of its existence (New York).

> "Whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere."
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> **Relf v. Rundle**, 103 U. S. 222, cited in 109 U. S. 527, at 537.

Respectfully submitted,

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